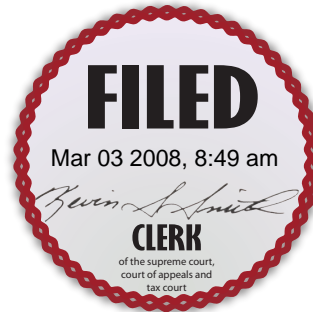


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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IN RE THE MARRIAGE OF:  
CHERYL KOOPMANS-CLARK,

Appellant-Petitioner,

vs.

KENNETH J. CLARK,

Appellee-Respondent.

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No. 02A03-0706-CV-300

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APPEAL FROM THE ALLEN SUPERIOR COURT  
The Honorable Charles F. Pratt, Judge  
The Honorable Thomas P. Boyer, Magistrate  
Cause No. 02D07-0303-DR-129

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**March 3, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## Case Summary

Cheryl Koopmans-Clark (“Wife”) appeals the trial court’s order on her Motion to Correct Errors. Specifically, she argues that the trial court erred in ruling that Kenneth J. Clark’s (“Husband”) 401(k) Retirement Savings Plan and Defined Benefit Pension Plan with his employer are individual property, and not marital property, according to their prenuptial agreement. According to the unambiguous language of the prenuptial agreement, Wife agreed to sign a waiver of her rights to Husband’s retirement and pension plans, and—given the dissolution proceedings—the time has now come for her to do so. Accordingly, the trial court properly determined that the plans are Husband’s individual property and ordered Wife to execute the necessary paperwork waiving her rights in them. We affirm.

## Facts and Procedural History

Husband and Wife married on July 2, 1994. At the time of their marriage, Husband was employed at International Truck and Engine Corporation.<sup>1</sup> A few days before their marriage, Husband and Wife executed an Antenuptial Agreement (“the Agreement”). The relevant provisions of the Agreement provide:

WHEREAS,<sup>[2]</sup> each party has agreed to accept the provisions of this Agreement in lieu of all of his or her marital rights on the death of either of them or upon dissolution of marriage or divorce or legal separation of them, in the property, either real or personal, tangible or intangible, owned by either of them. *Also, the parties agree that each of them will waive any*

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<sup>1</sup> The parties stipulated that the value of Husband’s 401(k) plan at the time of marriage was approximately \$14,000.00. Appellant’s App. p. 200.

<sup>2</sup> This “whereas” paragraph is included in the preamble of the Agreement. The Agreement goes on to provide, “The statements made in the preamble to this Agreement are hereby adopted and made a part of this Agreement.” *Id.* at 329.

*spousal right in any pension plans or IRAs which the other party owns.* The parties do, however, understand that under a recent court interpretation of the Retirement Equity Act of 1984 that waivers of spousal benefits in pension plans which are subject to ERISA are not effective unless the spouse, after the marriage, signs a valid waiver to receive such spousal benefits.

\* \* \* \* \*

7. RIGHTS UPON DISSOLUTION OR DIVORCE. If the intended marriage shall be terminated by a decree of dissolution or divorce, each spouse agrees that in the division and disposition of the marital estate he or she shall not seek or demand any portion or share of the Individual Property<sup>[3]</sup> of the other. Each spouse shall be entitled as part of the final division and disposition of the marital estate to one-half (1/2) of the COMMON PROPERTY, plus his or her respective Individual Property.

Appellant's App. p. 328-329, 335 (emphasis added). In addition, according to paragraph 11 of the Agreement, which is entitled Cooperation, "Each party shall, upon the other's request, do any and all acts and execute, acknowledge and deliver to the other party any and all instruments reasonably necessary or expedient to effectuate the purpose and intent of this Agreement." *Id.* at 336. Likewise, paragraph 18(D) of the Agreement provides that the parties "shall, upon the request of the other, execute, acknowledge and deliver to the other any and all instruments or documents necessary or appropriate to accomplish the provisions of this Agreement." *Id.* at 339.

During the course of their marriage, Husband and Wife adopted two children, one who was born in 1999 and the other who was born in 2000. In March 2003, Wife filed a petition to dissolve the parties' marriage. On May 13, 2005, Husband, by counsel, sent Wife, through her counsel, a letter asking Wife to execute a Waiver of Interest regarding Husband's pension accounts. *Id.* at 353. Wife did not execute the Waiver of Interest.

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<sup>3</sup> The Agreement defines Husband's Individual Property as "any and all assets, property, things of value, and debts titled in the name of KENNETH J. CLARK individually, or titled to any trust created by KENNETH J. CLARK, or of which he is a named beneficiary, except a Joint Revocable Living Trust created jointly by Husband and Wife, at the time of marriage o[r] thereafter." *Id.* at 333.

On January 5, 2006, the trial court issued a comprehensive and detailed Decree of Dissolution of Marriage. The Decree provides, in pertinent part:

60. On June 30, 1994, [Wife] and [Husband] executed an Antenuptial Agreement. There is no dispute that the Antenuptial Agreement is binding and enforceable upon the parties. The only dispute with respect to the Antenuptial Agreement is the treatment of [Husband's] 401(k) Retirement Savings Plan with International Truck and Engine Corporation.

\* \* \* \* \*

66. The Court finds that [Husband's] 401(k) Retirement Savings Plan with International Truck and Engine Corporation is [Husband's] Individual Property as defined in the parties' Antenuptial Agreement. This finding based upon the "four corners" of the parties' Antenuptial Agreement is consistent with [Wife's] testimony regarding the parties' intent with respect to [Husband's] 401(k) Retirement Savings Plan with International Truck and Engine Corporation.

67. [Husband] has previously requested that [Wife] execute any and all necessary forms, waivers, and releases to transfer any and all interest that [Wife] may have in [Husband's] 401(k) Retirement Savings Plan with International Truck and Engine Corporation to [Husband], and [Wife] has failed and refused to comply with that request.

68. [Wife] is ordered to immediately execute any and all necessary forms, waivers, and releases to transfer any and all interest that [Wife] may have in [Husband's] 401(k) Retirement Savings Plan with International Truck and Engine Corporation to [Husband].

\* \* \* \* \*

70. [Husband] is granted and awarded [Husband's] sole property, free and clear of any and all claims, which [Wife] [may] have therein or thereto, all of [Husband's] Individual Property as defined [in] the parties' Antenuptial Agreement, including but not limited to [Husband's] 401(k) Retirement Savings Plan with International Truck and Engine Corporation.

Appellant's Br. p. 30-32.<sup>4</sup> Thereafter, Wife filed a Motion to Correct Errors.<sup>5</sup> Following a hearing on Wife's motion, the trial court issued an order on April 24, 2007. That order provides, in pertinent part:

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<sup>4</sup> Although Wife's counsel included the Decree of Dissolution of Marriage in the Appellant's Brief, counsel did not include it in the Appellant's Appendix. Indiana Appellate Rule 50(A)(2)(f) provides that the Appellant's Appendix "shall contain" "pleadings and other documents from the Clerk's Record in chronological order that are necessary for resolution of the issues raised on appeal."

3. At Paragraphs 60 through and including 70 of the Decree, the Court entered specific findings of fact, conclusions of law, and orders with respect to whether [Husband's] 401(k) Retirement Savings Plan with International Truck and Engine Corporation was [Husband's] Individual Property or Community Property within the parameters of the parties' Antenuptial Agreement. The Court through a scrivener's error inadvertently failed to include [Husband's] Defined Benefit [Pension] Plan with International Truck and Engine Corporation in the aforesaid findings of fact, conclusions of law, and orders.
4. The determination of whether [Husband's] 401(k) Retirement Savings Plan with International Truck and Engine Corporation is [Husband's] Individual Property or Community Property within the parameters of the parties' Antenuptial Agreement, is identical to the determination of whether [Husband's] Defined Benefit Pension Plan with International Truck and Engine Corporation is [Husband's] Individual Property or Community Property within the parameters of the parties' Antenuptial Agreement.
5. To correct the scrivener's error, the Court amends Paragraphs 60, 66, 67, 68, and 70 of the Decree . . . .

Appellant's Br. p. 16.<sup>6</sup> Specifically, the court amended these paragraphs to reflect that Husband's 401(k) Retirement Savings Plan *and* Defined Benefit Pension Plan are Husband's Individual Property as defined in the Agreement and that Wife must execute any and all necessary paperwork to reflect that she has no interest in them. Wife now appeals.

### **Discussion and Decision**

Wife contends that the trial court erred in its interpretation of the Agreement. Antenuptial agreements are legal contracts by which parties entering into a marriage relationship attempt to settle the interest of each party in the property of the other during

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<sup>5</sup> Wife's counsel did not include the Motion to Correct Errors in the Appellant's Appendix. Accordingly, we do not know the specific arguments she made in that motion. We remind counsel of Appellate Rule 50(A).

<sup>6</sup> Wife's counsel only included this order in the Appellant's Brief. Appellate Rule 50(A)(2)(b) provides that the Appellant's Appendix "shall contain" "the appealed judgment or order, including any written opinion, memorandum of decision, or findings of fact and conclusions thereon relating to the issues raised on appeal."

the course of the marriage and upon its termination by death or other means. *Boetsma v. Boetsma*, 768 N.E.2d 1016, 1020 (Ind. Ct. App. 2002) (citations omitted), *reh'g denied*, *trans. denied*. Antenuptial agreements are to be construed according to principles applicable to the construction of contracts generally. *Id.* The interpretation of a contract is primarily a question of law for the court and is reviewed *de novo*. *Id.*; *see also Steve Silveus Ins., Inc. v. Goshert*, 873 N.E.2d 165, 173 (Ind. Ct. App. 2007). If the language of the instrument is unambiguous, the intent of the parties must be determined from its four corners and the language is given its plain and ordinary meaning. *Boetsma*, 768 N.E.2d at 1020; *see also Magee v. Garry-Magee*, 833 N.E.2d 1083, 1087 (Ind. Ct. App. 2005).

Specifically, Wife argues that “the Agreement created a condition subsequent with respect to the retirement benefits and the Husband’s failure to comply with that condition subsequent make[s] the Husband’s retirement assets marital property divisible by the trial court.” Appellant’s Br. p. 7. In support, Wife relies on the following language from the Agreement: (1) “Also, the parties agree that each of them *will* waive any spousal right in any pension plans or IRAs which the other party owns” and (2) “waivers of spousal benefits in pension plans which are subject to ERISA are not effective *unless the spouse, after the marriage, signs a valid waiver to receive such spousal benefits.*” Appellant’s App. p. 328-29 (emphases added) (Preamble). Wife alleges that the emphasized language creates a condition subsequent because “the Agreement clearly establishes the parties’ understanding that to bring retirement assets

within its definition of their respective individual property, they each had to take affirmative action following their marriage.” Appellant’s Br. p. 8.

We first note that Wife does not define the term “condition subsequent” or analyze how the Agreement creates such a condition. Husband responds that the language does not create a condition subsequent but rather a condition precedent. We therefore turn to the definitions. In general terms, “[a] condition precedent is either a condition which must be performed before the agreement of the parties becomes binding, or a condition which must be fulfilled before the duty to perform an existing contract arises,” whereas “[a] condition subsequent is a condition which, if performed or violated (as the case may be), defeats the contract.” *Barrington Mgmt. Co. v. Paul E. Draper Family Ltd. P’ship*, 695 N.E.2d 135, 141 (Ind. Ct. App. 1998). According to these general definitions, the language in the Agreement creates, if anything, a condition precedent. That is, under the Agreement, Wife’s post-marriage waiver is required for Husband’s 401(k) Retirement Savings Plan and Defined Benefit Pension Plan to be considered his Individual Property.

This discussion of terminology aside, we now turn to the merits of the case. Wife first points out that the parties’ understanding in the Agreement that a spousal waiver was required after marriage may have been inaccurate. *See* Appellant’s Br. p. 11 n.2 (“In fact, the Retirement Equity Act of 1984 to which the Agreement refers at pp. 2-3 applies only [to] invalidate antenuptial agreements in the absence of ERISA-mandated waivers of spousal *death* benefits under retirement plans.”) (citations omitted). Nevertheless, Wife posits that the parties’ misunderstanding of the law is “legally insignificant.” *Id.* at 11. Even assuming a waiver is required, according to the unambiguous language of the

Agreement, Wife—without any time limitation—agreed to execute such a waiver after the parties’ marriage. Specifically, Wife agreed to waive her rights to Husband’s pension (Preamble) and not to seek or demand any portion of Husband’s Individual Property in the event of divorce (Paragraph 7).

Nevertheless, Wife argues that Husband’s failure to designate a beneficiary other than herself under his 401(k) Retirement Savings Plan and Defined Benefit Pension Plan operates as a waiver. She relies on *Pedro Enterprises, Inc. v. Perdue*, 998 F.2d 491 (7th Cir. 1993). In *Perdue*, the issue was “whether an antenuptial agreement waives a surviving spouse’s rights in a pension plan when the agreement makes no mention of pension benefits and the pension plan at issue was not even in existence at the time of the marriage.” *Id.* at 492. Specifically, the antenuptial agreement in that case “was limited to property which passed by will or intestate succession,” and there was no language suggesting a waiver to non-probate transfers such as pension plans. *Id.* at 493. There is a critical distinction between *Perdue* and this case. Here, the Agreement specifically references pension plans and IRAs, which means that the parties obviously intended to give up whatever rights they may have in each other’s pension plans and IRAs. In addition, the issue in *Perdue* surfaced upon the husband’s death, not divorce. *Perdue* is not controlling.

The Agreement provides that Wife “will waive any spousal right in any pension plans or IRAs which the other party owns” and shall “not seek or demand any portion or share of [Husband’s] Individual Property” in the event of divorce. Appellant’s App. p. 328, 335. Because this language is unambiguous, we will give it its plain and ordinary



meaning. That is, Wife—without any time limitation—agreed to waive her interest in Husband’s 401(k) Retirement Savings Plan and Defined Benefit Pension Plan, and the time has now come for Wife to do so. That action was taken only when the need arose, *i.e.*, during the divorce proceedings, does not mean that Wife was relieved of her obligation under the Agreement to execute such waivers. As such, the trial court properly determined that Husband’s 401(k) Retirement Savings Plan and Defined Benefit Pension Plan are his Individual Property and ordered Wife to execute documents waiving her interest in these plans.

Affirmed.

SHARPNACK, J., and BARNES, J., concur.